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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

23 Cr. 00490 (SHS)

5 ROBERT MENENDEZ, et al.

6 Conference

7 Defendants.

8
9 New York, N.Y.
May 6, 2024
10 11:00 a.m.

11 Before:

12 HON. SIDNEY H. STEIN,

13 U.S. District Judge

14 APPEARANCES

15 DAMIAN WILLIAMS

16 United States Attorney for the
Southern District of New York

17 PAUL M. MONTELEONI

ELI MARK

18 LARA E. POMERANTZ

DANIEL C. RICHENTHAL

19 CHRISTINA A. CLARK

Assistant United States Attorneys

20 ADAM FEE

21 AVI WEITZMAN

Attorneys for Defendant Robert Menendez.

22 LAWRENCE S. LUSTBERG

23 ANNE M. COLLART

RICARDO SOLANO, JR.

24 Attorneys for Defendant Wael Hana.

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APPEARANCES, Continued:

CESAR DE CASTRO

SETH H. AGATA

SHANNON M. MCMANUS

Attorneys for Defendant Fred Daibes.

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(Case called.)

THE DEPUTY CLERK: All counsel please state your names for the record.

MR. MONTELEONI: Good morning, your Honor. Paul Monteleoni for the government. With me at counsel table are my colleagues Dan Richenthal, Eli Mark, Lara Pomerantz, as well as Christina Clark, a trial attorney from the National Security Division of the Department of Justice.

THE COURT: Good morning.

MR. FEE: Good morning, your Honor. For Senator Menendez, Adam Fee and Avi Weitzman to my left.

Your Honor, we have conferred with the defendant, and he has agreed to waive his appearance. We have discussed everything that may happen in morning, and he's comfortable with that.

THE COURT: Good morning.

MR. LUSTBERG: Good morning, your Honor. Laurence S. Lustberg from Gibbons, PC, on behalf of Wael Hana. With me at counsel table are my partners, Ricardo Solano and Anne Collart.

We also have consulted with your client, who knowingly and voluntarily waived his appearance today.

THE COURT: Good morning. I accept the waivers from both of your clients.

MR. DE CASTRO: Good morning, your Honor. Cesar De Castro, Seth Agata and Shannon McMahon for Fred Daibes, who

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1 also waived his appearance today, and we have discussed it with
2 him.

3 THE COURT: I accept that waiver.

4 Please be seated.

5 We have a full agenda. Let me begin with the in
6 limines and I'll go in order according to the ECF filings. I
7 have views and conclusions on many of them, but I'll hear
8 argument on a few.

9 First let's do ECF 291, which is the government's
10 motions to preclude certain evidence. Item number one is
11 uncontested, so it's dismissed as moot. That's seeking a
12 preclusion of evidence that the charges are vindictive,
13 selective, politically motivated or brought for improper
14 purposes.

15 The second one is seeking preclusion that the
16 Senator's conduct should have been handled other than through
17 criminal prosecution, that the prosecution would have negative
18 consequences. That's largely uncontested. He's not going to
19 argue that the conduct should have been handled in some other
20 way, but there's one aspect of that I want to discuss with the
21 parties and that's whether evidence should be permitted on
22 whether he was warned by the government about the actions of
23 the Egyptian authorities trying to make him aware or actions
24 leading to his being an agent, however you want to phrase it.

25 The argument it seems to me for allowing it is that it

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1 goes to his scienter. Sort of a weak argument, but I see it
2 theoretically. That is, because he wasn't warned, he didn't
3 realize that he was becoming an agent or at risk of being an
4 agent or was an agent, and the argument on the other side is to
5 relevance -- there's clearly no duty of the authorities to warn
6 somebody that the Egyptian authorities were taking steps to
7 make him an agent.

8 So I see it both ways, but let's hear argument. It's
9 the government's motion.

10 MR. RICHENTHAL: Your Honor, our view I think is
11 pretty simple. If the defense wishes to argue, for example, in
12 summation, that the jury has heard no evidence that
13 Mr. Menendez was warned that what he was doing was illegal and,
14 therefore, the jury should conclude that we haven't met our
15 burden, I don't expect we would object, but that's very
16 different from seeking to elicit affirmatively that, for
17 example, the Federal Bureau of Investigation in theory could
18 have warned him and chose not to, because that evidence doesn't
19 go to our lack of proof, or alleged lack of proof. That
20 evidence can only be reasonably understood by a lay jury as a
21 suggestion that the FBI, or the DOJ more generally, should have
22 warned him, and that gets into charging policies, that gets
23 into counter-intelligence matters, that has no relevance in our
24 judgment. But even if it had a modicum of relevance, it would
25 turn this trial, which is about the defendant's guilt, into

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1 something else, the choice by the government that he's here
2 instead of warned off of the conduct. Under Rule 403, that
3 simply should not be permitted.

4 THE COURT: All right. Mr. Fee or Mr. Weitzman.

5 MR. FEE: Your Honor, that was the argument presented
6 in the papers. I won't repeat the other side of it. But this
7 is an argument case. The government's case relies on
8 inference. The Court characterized it as weak. I think it is
9 an argument that the jury could be persuaded by, of course it's
10 not at the core, that the Senator did not know, did not have
11 any belief that what he was doing was wrong --

12 THE COURT: Well, you can argue that.

13 MR. FEE: We will argue that, but, your Honor, we are
14 thinking of a very -- a question or two or three to an FBI
15 agent eliciting the fact that they did not attempt to warn
16 Senator Menendez at any point that they believed he was
17 engaging with foreign intelligence agents. And, your Honor,
18 the government's proof, the chronology of it is going to have
19 the FBI encountering sources who are dealing with people the
20 government says are Egyptian foreign agents.

21 THE COURT: I understand that, but the jury should not
22 be led to believe or should not have evidence on the basis of
23 which it could conclude that the government had an affirmative
24 obligation here.

25 MR. FEE: Your Honor, we are not going to make that

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1 argument. The jury is told all the time to consider arguments
2 as they are expressed and not for any other proper purpose. We
3 are not going to make the argument that they had an obligation
4 to warn him. We are going to -- we would like to argue and
5 think the jury should hear the argument that it suggests, the
6 Governor -- the Senator had no warning and no intention to do
7 anything that would violate the law.

8 MR. RICHENTHAL: I'm happy to respond further.

9 THE COURT: Go ahead.

10 MR. RICHENTHAL: Again, the jury will know he wasn't
11 warned because there will be no evidence of a warning. What
12 we're talking about here is whether an agent should be
13 cross-examined --

14 THE COURT: I understand. I'm going to exclude it.
15 The argument can be made that, jury, you've heard no evidence
16 that there was any warning. I think to have questioning of
17 agents as to why they -- that they didn't allow the jury to
18 draw the inference that they should have, I think that the
19 probative value is very low, and it's substantially outweighed
20 by danger of confusing the issues and misreading the jury. So
21 I'm going to exclude that under 403 ruling.

22 All right, the third motion by the government is
23 evidence of, punishment should be precluded. I'm not sure why
24 the government even made that motion, but of course the
25 defendants don't object. It's uncontested. So that's

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1 dismissed as moot. There will be no evidence in this trial of
2 punishment. That's solely for the Court, and all the parties
3 know that.

4 The fourth motion is to preclude evidence regarding
5 the Senator's prior federal criminal case. Everyone agrees,
6 absent his testifying, that it's not going to come in. It's a
7 different issue if and when he decides to take the stand, if he
8 does. So right now I'll dismiss that as moot.

9 The fifth motion is to preclude evidence regarding
10 whether the government has met its discovery obligations.
11 Again, I'm not quite sure why the government bothered to make
12 that. There's no opposition to it. I certainly wouldn't allow
13 any such argument. So that's dismissed as moot.

14 Sixth is preclusion whether the government has -- of
15 evidence of whether the government has brought unrelated cases.
16 That's not contested, also dismissed as moot.

17 The seventh is evidence or argument to preclude
18 evidence or argument regarding whether the charges are vague.
19 Once again, I don't know what the government brought that
20 argument -- what he can argue is that it's a legal issue, it's
21 not for argument, and that's already been raised in the prior
22 motions here, so I'm dismissing that as moot.

23 Number eight is to preclude evidence or argument
24 whether others engaged in similar conduct. The Senator wants
25 to show that senators often meet with foreign officials, join

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1 on position papers, and advocate for laws. I mean, I have no
2 objection to that. If that's where it goes, I mean, that's
3 fine. I don't think there's any argument here.

4 Sir.

5 MR. RICHENTHAL: So I think I would phrase it that the
6 line here may be more dotted than solid, but here's where we
7 see the line. Between the types of things your Honor just
8 mentioned of which Senator Menendez had contemporaneous
9 knowledge and the types of things your Honor just mentioned of
10 which he --

11 THE COURT: Wait. Wait. Wait. You're saying he
12 knows that Senator so and so and Senator so and so joined with
13 him on this resolution, or he joined with Senator so and so and
14 so and so on this resolution? Is that what you're saying?

15 MR. RICHENTHAL: Exactly.

16 THE COURT: That's not an issue.

17 MR. RICHENTHAL: Agreed. That's perfectly admissible.
18 That's our point. Our concern based on some of the statements
19 in prior papers by the defendant is that -- and, frankly, also
20 based on page seven of their brief in opposition to our motion
21 in limine is that they may intend to introduce evidence about
22 the actions of other senators of which the defendant had no
23 contemporaneous knowledge at all, in which case our view is
24 it's irrelevant and confusing to the jury.

25 In other words, in hindsight, perhaps based on

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1 discovery, they've learned that other people did similar
2 things. Well, that's not relevant to an issue in front of the
3 jury. For the jury, the jury should know what the defendant
4 knew at the time, and that may include trips he went on with
5 other people, it may include conduct engaged in by other
6 people, but it shouldn't be conduct engaged in by other people
7 of which he had no knowledge at the time he engaged in the
8 charged conduct.

9 THE COURT: Well, how is that line drawn?

10 MR. RICHENTHAL: I think, your Honor, can police it in
11 realtime, but let me just give you an example. Let's assume
12 for the sake of argument the defendant either on direct or
13 cross-examination, that is either his case or our case, would
14 like to put in information about a trip that Mr. Menendez was
15 on or contemporaneously aware of. That would seem to go to his
16 mental state, at least in theory.

17 But let's assume something else. Let's assume on
18 cross-examination, for example, the defendant's staff -- or the
19 defendant's lawyers try to put in evidence of a trip that the
20 defendant had no knowledge of, maybe even was years earlier or
21 years later. At the point we would say there's no connection
22 with defendant's contemporaneous mental state.

23 THE COURT: I understand.

24 Mr. Fee.

25 MR. FEE: Your Honor, I'm not sure what the government

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1 is envisioning. I will say this. If the government is arguing
2 an inference, like they will hear that the fact that an
3 intelligence individual met with Senator Menendez on this trip,
4 it is perfectly appropriate to offer evidence through a
5 staffer, through an ambassador, through another Senator that
6 they regularly meet with intelligence officials on these exact
7 same sort of trips --

8 THE COURT: That's not an issue. Go ahead.

9 MR. FEE: If you mean that's not an issue, you're okay
10 with that, your Honor, I think we're done.

11 THE COURT: All right.

12 MR. FEE: Your Honor, I have one issue about one of
13 the moot motions.

14 THE COURT: Yes.

15 MR. FEE: It's government's motion four, the prior
16 criminal prosecution.

17 THE COURT: Yes.

18 MR. FEE: We raised it in our papers. I do think it's
19 important for the Senator to understand that he considers his
20 testimony --

21 THE COURT: It's not -- I'm sorry.

22 MR. FEE: No. Please go ahead, your Honor.

23 THE COURT: I shouldn't interrupt you.

24 MR. FEE: No. No.

25 THE COURT: Go ahead, please.

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1 MR. FEE: I think maybe you were about to say, the
2 government -- it's a semantic difference. In their motion they
3 said they might inquire about it if he chooses to testify.
4 That's not okay. If he opens the door and he does testify and
5 talks about it, obviously they can inquire about it. But the
6 first thing, we want to make sure the government is not taking
7 that position, that the fact that the Senator is taking the
8 stand somehow opens the door in and of itself.

9 THE COURT: I don't think it's something we have to
10 worry about at this point. It's highly premature.

11 MR. FEE: Thank you, your Honor.

12 MR. RICHENTHAL: Can I go back briefly to the other
13 Senator's point?

14 THE COURT: Yes.

15 MR. RICHENTHAL: Again, I may be taking too liberally
16 what's written on page seven of their brief, but they write
17 "the defendant intends only to argue he lacked criminal intent
18 and evidence that many other senators lawfully took the same
19 actions as Senator Menendez meeting with foreign governments in
20 the matter advocating for the same position the foreign
21 government urged may make inference of no criminal intent more
22 plausible."

23 That sentence is devoid of any connection in date or
24 otherwise to the defendant's contemporaneous knowledge. That's
25 exactly the point I'm trying to make. It may be your Honor

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1 can't rule in advance, but we think there is a line here
2 between the evidence of which he had current knowledge,
3 knowledge of the time he acted, and evidence of which he did
4 not. And we think that the general inquiry of whether senators
5 at some point unbeknownst to him --

6 THE COURT: Understood, and you have attuned me to
7 that difference. Thank you. I don't think there's any need
8 for a ruling at this point.

9 All right. Nine, government seeks to preclude
10 evidence as to whether the charged acts were good for the
11 public. I'm not quite sure what that argument is. It seems to
12 me the Senator should be able to adduce from however he's going
13 to adduce it that one of the reasons he was doing things was he
14 thought it was in the public interest.

15 Does the government have any objection to that?

16 MR. RICHENTHAL: No. I agree 100 percent with what
17 your Honor just said. Our concern is the similar concern we
18 raised a minute ago, that devoid of his contemporaneous intent,
19 the defendant may argue that, in hindsight, the actions were
20 allegedly good for the United States or not harmful for the
21 United States.

22 THE COURT: Again, I can't rule in the abstract. I
23 understand that position.

24 Mr. Fee, I assume there's no issue here.

25 MR. FEE: All good, your Honor.

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1 THE COURT: All right. Ten, the government requests a
2 preclusion of defendant's prior good acts to show propensity to
3 not commit crimes. I mean that, just the way it's phrased,
4 answers the question. I think everyone agrees the Senator can
5 introduce evidence of his record as Senator on relevant issues.
6 He's going to. That's part and parcel of what the trial is
7 about.

8 In regard to Mr. Daibes, he argues he wants to put in
9 the fact that he's a habitual gift giver. It seems to me that
10 can come in. However -- I mean, if it's admissible, I don't
11 have any objection to that. I assume the government doesn't
12 either. That's my ruling there.

13 MR. RICHENTHAL: I agree with everything your Honor
14 just said. I would just note, I think this is something I keep
15 saying, your Honor used the word "relevant" in describing the
16 prior good acts. We agree, not all acts would be relevant to
17 these charges. Acts towards Egypt, for example, probably are.
18 Acts unrelated to Egypt or Qatar probably are not. That was
19 exactly our concern.

20 THE COURT: Okay. 401, irrelevant evidence does not
21 come in.

22 All right. Eleven, the government seeks to preclude
23 evidence of the defendants' -- all of the defendants' family
24 background, age, health or other personal characteristics.
25 Highly premature. There's no need for me to rule on that now.

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1 If and when someone takes the stand, we'll see. That is ECF
2 291.

3 Let's turn to ECF 290. Menendez's motion to preclude
4 speculative evidence and testimony. First motion there is the
5 Senator seeks to preclude speculative testimony regarding items
6 of value seized from the Menendez home. Apparently,
7 Mr. Menendez says that the -- he concedes that the evidence of
8 the gold and the specific money that has allegedly fingerprint
9 or DNA evidence tying it to these defendants can come in, but
10 the cash or I think there may be a gold bar, I'm not sure, of
11 the 11 where there's no -- that they can't track the number on
12 the bar to Daibes or Hana, that shouldn't come in. That
13 doesn't make sense here.

14 The cash and gold bars found in the Menendez house,
15 all of it is admissible here. All the cash and the gold was
16 all stashed in the same way -- standard is the wrong word, was
17 kept in the same manner. It was kept throughout the house in
18 similar fashion, stuffed in pockets, in a safe, in jackets, and
19 apparently some of the money was withdrawn \$10,000 at a time
20 from -- \$10,000 at a time.

21 It's a permissible inference that all the money and
22 the gold was part of the alleged scheme. The defendants will
23 have an argument, should they choose to make it, that goes to
24 the weight of that evidence in regard to the gold and the cash
25 that doesn't have its fingerprints or DNA on it, that is of

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1 Daibes or Hana or Daibes' driver. It goes to the weight, not
2 the admissibility. I do find that the probative value
3 substantially outweighs any prejudice here and I am allowing it
4 in.

5 The second motion by Menendez is to preclude evidence
6 regarding high end watches. I must say that I originally was
7 thinking that if all we had was the text, how about one of
8 these, that makes sense to preclude it as overly speculative.
9 I have no idea -- I would have had no idea about what "one of
10 these" means. But the government has proffered in its papers
11 that that message itself, how about one of these, with pictures
12 of high end watches, paragraph 58 in the indictment, the
13 government has proffered that it was sent via an encrypted app
14 and sent two days before Daibes sent Menendez a link tracking a
15 Menendez resolution that supported Qatar and shortly after a
16 dinner with the Qatari officials and immediately before Daibes
17 gave Menendez a one carat kilogram gold bar.

18 On the basis of that good faith proffer, I am allowing
19 that evidence. The probative value is not outweighed by a
20 danger of unfair prejudice. It's highly probative, and there's
21 very little danger of unfair prejudice or confusing the issues.
22 So under 403, I am allowing that evidence in. I'm not
23 precluding the evidence of the high end watches.

24 MR. FEE: Your Honor.

25 THE COURT: Sure.

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1 MR. FEE: I hear the ruling and have nothing further
2 to say about that. It spurs one additional issue in my mind I
3 did want to flag just to perhaps promote economy at the trial.
4 The government has begun to use the phrase "encrypted messaging
5 app" regularly. I fear we're going to hear it in the opening
6 and in argument. I will make the point that all messaging apps
7 these days are encrypted, and if the government does that, I do
8 feel we would be obliged to ask witnesses on the stand if they
9 use these same apps. But there is essentially no messaging
10 that is not encrypted.

11 So I think the Court should be aware if they're
12 permitted to make that point and make that argument, the
13 defense will be required to meet it to some degree.

14 THE COURT: Yes, sir. Go ahead.

15 MR. RICHENTHAL: I'm not sure it's technically true
16 they're all equally encrypted, but that aside --

17 THE COURT: I must say I don't know.

18 MR. RICHENTHAL: But that aside, whether an individual
19 human being, lay witness uses an app is plainly not appropriate
20 to be crossing the witness. If the defense wants to elicit
21 testimony, for example, from a technical expert, of which we're
22 calling one, about how the app works, I don't think we'd object
23 to that, but individual's use of apps, I don't see the
24 relevance of that at all.

25 THE COURT: I think an individual may know or have a

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1 belief as to whether the app he or she was using was encrypted,
2 whatever that means.

3 MR. RICHENTHAL: Maybe. It begins to seem like expert
4 testimony to me. Again, we are calling a technical expert. I
5 don't think there will be any dispute what apps are and are not
6 encrypted. What I'm resisting is the idea that lay witnesses
7 should be cross-examined as to what apps they use.

8 MR. FEE: The point, your Honor, is different than
9 that. I don't want to ask anybody technical questions. I
10 believe the argument the government will make is the fact that
11 facially innocent messages like, "hey, I'll see you there; I'll
12 meet you at the cafe," were sent on an encrypting messaging app
13 by itself supports the inference that these were communications
14 in furtherance of a crime.

15 I would submit and believe that everyone at that table
16 and almost every witness they call has these same apps on their
17 phone and uses them. So that would be the sort of questioning
18 we would be obliged to do with limited --

19 THE COURT: I don't think I need to rule on it at this
20 point.

21 MR. FEE: I agree, sir. Thank you, your Honor.

22 THE COURT: Number three, this is by Menendez to
23 preclude speculative testimony regarding the reasons the Qatari
24 Investment Co. invested in Daibes owned -- in real estate
25 projects that Daibes owned. I'm not sure what this motion is.

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1 Clearly, the reasons why the Qatari Investment Company invested
2 in the owned real estate is relevant here. I think the motion
3 is to preclude inadmissible evidence. If that's the motion,
4 that motion would be granted for everything. Inadmissible
5 evidence can't come in. So what's that motion?

6 MR. FEE: Your Honor, I don't know if I need to
7 formally withdraw this -- this was before we saw the 3500 and
8 realized that witnesses were saying the opposite from Heritage,
9 the Qatari Investment Company that was not connected. So I
10 have nothing further to say about your Honor's observation.
11 Thank you.

12 THE COURT: Fine. Now, that makes me think about the
13 pending Rule 15 motion which I'm working on. I'm not inclined
14 to grant it. I need to think more about it. But it seems to
15 me that to the extent what's at issue is the four bullet points
16 set forth in the Menendez motion -- do you know the bullet
17 points I'm talking about -- that could be the subject of
18 stipulation by the parties, obviating the need for the Rule 15
19 element, although the exact words of those bullet points I
20 would assume are not acceptable to the government, but it does
21 seem to me a fair ground for the parties to resolve that by way
22 of stipulation.

23 Government?

24 MR. RICHENTHAL: We're certainly open in good faith
25 considering any stipulation. I will say our view of the bullet

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1 points if your Honor is referring to document 360 at page two
2 is that they're not factually accurate and not what the
3 witnesses we believe would say. But we're certainly open to
4 considering in good faith anything the defense presents.

5 Frankly, even if we think it's inadmissible, we'll
6 gladly sign the stipulation and argue about it -- that's been
7 our position since the beginning.

8 MR. FEE: You heard him agree to admit inadmissible
9 evidence, your Honor. But yes, we're open to a stipulation.

10 THE COURT: All right. But do that --

11 MR. FEE: Fast.

12 THE COURT: Focus on that now. That's right, because
13 the parties deserve a position on the Rule 15.

14 MR. FEE: Yes, sir.

15 THE COURT: The very late Rule 15 which the defendants
16 have said the parties will oppose the motion. If you can
17 resolve it by stipulation, do so.

18 Next one. Request by Menendez to preclude testimony
19 regarding why IS EG Halal received the contracts from the
20 Egyptian Government. I mean, certainly why is relevant. The
21 parties seem to disagree as to whether or not they have
22 admissible evidence. All I can tell you is I'm not going to
23 admit speculation, but if there are text messages that fall
24 within the Rules of Evidence, it seems to me it comes in, it's
25 relevant. What's the issue here? I don't see an issue.

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1 MR. FEE: Your Honor, you're right you can rule on
2 this as it comes. We have seen the 3500 --

3 THE COURT: The ruling would be on the basis of the
4 Rules of Evidence.

5 MR. FEE: Understood.

6 THE COURT: What I'm saying is the subject is relevant
7 under 401 and 402, and I don't see a Rule 403 issue.

8 MR. FEE: Agreed. The 403 issue has really become a
9 401 issue as well. We have seen evidence and witness
10 interviews of USDA officials guessing at the reasons why IS EG
11 Halal got this contract.

12 THE COURT: Guesses aren't permitted.

13 MR. FEE: I understand, your Honor. Just flagging it
14 might be in some of the text messages the government may offer,
15 emails, and the like.

16 THE COURT: All right. That's ECF 290.

17 Let's go to ECF 292, which is Menendez's three motions
18 in limine to exclude evidence and testimony regarding campaign
19 donations and Senate financial disclosure forms. The first one
20 is to preclude evidence and testimony regarding campaign
21 donations. I'm going to allow them in. It shows the
22 development of the relationship of trust and confidence among
23 the co-conspirators. I'm talking about it looks like
24 fund-raisers' contributions from Uribe and Daibes.

25 The government isn't arguing it's part of the quid pro

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1 quo, and the government I don't think can argue that. I'll
2 give a limited instruction under 403 if the parties want, but
3 under 403 there's certainly probative value substantially
4 outweighs any danger or prejudice here, so it comes in to show
5 the development of the relationship with trust and confidence
6 among the co-conspirators.

7 Number two -- there's only two motions here. Number
8 two is to preclude evidence and testimony regarding Senate
9 financial disclosure forms. In the indictment it states that
10 Menendez did not disclose their Mercedes, the cash, the gold,
11 the Grand Prix tickets. That's paragraph 67. But he's not
12 charged with a violation of Senate financial disclosure form
13 rules. I'm going to allow it in. It's part of the crime
14 itself. That is, his failure to disclose things of value
15 received from co-conspirators seeking to issue officials acts.
16 It's evidence of consciousness of guilt, and, as I say, it's an
17 act in furtherance of the scheme.

18 There's no 403 issue here. It's highly probative of
19 his consciousness of guilt. Again, if the parties want, I'll
20 make it clear that he's not charged with violating Senate
21 disclosure forms rules.

22 All right. That handle ECF 292. Let's go on to ECF
23 293. Menendez's motion to preclude the government's noticed
24 404(b) evidence. First motion under that, the government
25 should be precluded from offering evidence of any prior

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1 criminal charges. I've taken care of that. Dismissed as moot.

2 Second, the government should be precluded from

3 offering evidence of Menendez's alleged financial needs.

4 That's also raised by Mr. Hana in ECF 289. This goes to the

5 financial circumstances and spending habits of Menendez and

6 Hana.

7 My ruling is that it's inextricably intertwined with

8 the evidence of the charged crimes. It goes to motive,

9 knowledge, and intent under 404(b), and there's no 403 issue

10 here. Now, meaning its probative value is not substantially

11 outweighed by the danger of unfair prejudice. You're confusing

12 the issues. The -- I'll start that again. Mr. Menendez's

13 alleged desire for the car, the gold, and so forth, goes to

14 motive, and the lifestyle that he had before and after is

15 relevant here especially -- not especially, it's also relevant

16 for Hana, that his life before getting the monopoly and after

17 goes to his motive as well, his knowledge and intent.

18 So under 403, I am allowing evidence of -- here it's

19 called lifestyle. I don't like that term -- but his spending

20 habits and financial circumstances can be relevant and we'll

21 get to that when we get to the expert witnesses. I'm still --

22 I'm getting a paper tomorrow on that, and then you'll have a

23 decision shortly thereafter as to the financial expert.

24 That having been said, I'm certainly not going to

25 allow things in like one case I saw there were hundreds of

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1 photographs of assets. That's not what we're talking about.
2 But to the extent it's relevant, what they were purchasing can
3 come in, and that, as I say, goes for Mr. Hana on ECF 289, as
4 well as Mr. Menendez on ECF 293.

5 Third motion on 293, the government should be
6 precluded from offering evidence regarding omitting things of
7 value on Menendez's tax returns. I am allowing that in. It's
8 evidence of consciousness of guilt. There are lots and lots of
9 cases on that. I'll give a limiting instruction if the parties
10 want it to make sure the jury knows he's not charged with any
11 tax fraud here, but under the 403 balancing test, I'm not going
12 to exclude relevant evidence, because I find its probative
13 value is not outweighed -- I'm sorry, its probative value is
14 substantially outweighed by any risk of prejudice. So I'm
15 allowing that in.

16 Number four, the government -- Menendez is saying the
17 government should be precluded from offering evidence regarding
18 Fusion Diagnostics, Inc. Now, Fusion is the company that paid
19 Mrs. Menendez, and apparently there were household gifts and
20 services rendered as well, or at least that's what the
21 allegations are, in exchange for the Senator seeking to
22 influence municipal officials to grant municipal contracts to
23 Fusion and authorizations to do COVID-19 testing.

24 My conclusion is that's part and parcel of the charged
25 offenses. It's relevant to motive and intent. It's relevant

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1 to common scheme or plan, because the use of another entity,
2 that is, IS EG Halal, in terms of the Egyptian issue, and the
3 SIBC, Nadine's company, in terms of the Fusion issue, is the
4 common scheme or plan. It also goes to absence of mistake or
5 accident. So, again, I'll give a limiting instruction if the
6 parties want, but I'm admitting it under 403.

7 Now let's go to Hana's motion in limine. I've already
8 dealt with the --

9 MR. FEE: Your Honor, I'm sorry.

10 THE COURT: Yes, sir.

11 MR. FEE: On the Fusion ruling, well understood, just
12 to flag, the defense may need to put on a witness or more
13 depending how the government intends to prove those Fusion
14 allegations, because there is significant *Brady* that I think is
15 the reason why it wasn't charged and we think the jury would
16 need to hear it, because essentially the government's
17 description --

18 THE COURT: What do you mean? Be specific.

19 MR. FEE: I will, your Honor. They say the
20 government's theory and the reason underlying the ruling based
21 on the government's proffer is Senator Menendez made a call to
22 a city official saying, "use this COVID testing firm, Fusion,"
23 and that there was some sort of pressure or influence. They
24 spoke to those city officials, the government, and they denied
25 that there was any influence. In fact, they said it didn't

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1 matter whether or not Menendez called. We were letting anybody
2 at that time show up and do our testing. So I don't know how
3 the government plans to prove this, but we think to undermine
4 the purposes for which you have admitted it, we would need to
5 call at least that witness and perhaps others.

6 THE COURT: Government.

7 MR. RICHENTHAL: I think this depends on if the proof
8 comes in. If it's admitted, for example, to show that
9 Ms. Menendez's company was used a certain way that has no
10 relationship whatsoever to whether state officials felt
11 pressured by Mr. Menendez, I don't think it's right per your
12 Honor's decision. We've heard your Honor's decision. We've
13 heard Mr. Fee's remarks without commenting on the facts to
14 which he alludes. Let's see how the evidence comes in.

15 THE COURT: Well, it strikes me that this is not a
16 significant part of the government's case. You may avoid a
17 problem, but obviously the government will put its proof on.

18 Okay. Hana's motions in limine. I handled the first
19 one. Second one, you request the government to be precluded
20 from introducing evidence that Hana was not registered as an
21 agent of a foreign principal. He's not charged with not being
22 registered. He's arguing it's irrelevant and prejudicial. It
23 seems to me that that's right.

24 Let me hear the government. I mean, he's not being
25 charged with failure to register. What's the relevance?

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1 Government?

2 MR. RICHENTHAL: No, he's not, but our view is it goes
3 to at least two things: First, it goes to his consciousness of
4 guilt, that is, desire to conceal the actions he's undertaking
5 as an intermediary between the Egyptian Government and
6 Mr. Menendez.

7 THE COURT: That assumes he's required to be an agent.

8 MR. RICHENTHAL: Not necessarily. It assumes he may
9 believe he's required to be an agent. What's in his head,
10 rather than that the proof --

11 THE COURT: Fair enough.

12 MR. RICHENTHAL: Second, part of what's going to
13 happen in this case, we believe -- that's what we anticipate
14 we'll see is the jury needs to understand the distinction, as
15 is relevant here with respect to Egypt and -- between
16 registered kind of overt lobbyists, for lack of a better
17 phrase, and for lack of a better phrase again, sort of secret
18 quasi-lobbyists.

19 THE COURT: I understand that.

20 MR. RICHENTHAL: And for the jury to understand that,
21 our view is they need to understand there is a public database
22 with respect to those registered under FARA and a public
23 database with respect to those registered under the Lobbying
24 Disclosure Act, that, in fact, there were lobbyists for Egypt
25 at the contemporaneous time, and that the people that Mr.

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1 Menendez was liaising with, giving information through and
2 getting directions from were not those people.

3 To place that in front of the jury we think the jury
4 needs to understand in general, not terribly detailed, the
5 regime I just described, but the people --

6 THE COURT: But nobody's disagreeing with that. Go
7 ahead.

8 MR. RICHENTHAL: But one of the people I just
9 mentioned, that is, that I call an intermediary, is Mr. Hana.

10 THE COURT: Right.

11 MR. RICHENTHAL: So the jury would have to know
12 Mr. Hana does not appear in those databases, that he was not a
13 registered lobbyist.

14 THE COURT: You can adduce that. Go ahead.

15 MR. RICHENTHAL: And he was not a registered agent.

16 THE COURT: You can adduce, I mean, whatever those
17 forms show. Go ahead.

18 MR. RICHENTHAL: If we can adduce that Mr. Hana, as
19 relevant to this motion, was not a registered agent or
20 lobbyist, then I think your Honor, and maybe I'm
21 misunderstanding, has actually denied Mr. Hana's motion. That
22 is what we intend to adduce. We're not going to prove he had
23 to register. We would like to prove he did not register. That
24 is, he did not appear in his --

25 THE COURT: You can -- Mr. Fee, it seems to me the

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1 government can --

2 MR. FEE: It's the better one, your Honor.

3 MR. LUSTBERG: This is mine.

4 THE COURT: Oh, yes. Sorry.

5 MR. LUSTBERG: But maybe he'll have a better answer.

6 THE COURT: Mr. Lustberg.

7 MR. LUSTBERG: Yes.

8 THE COURT: It seems to me the government should be
9 able to produce lists of registered agents, and if Hana isn't
10 on it, Hana isn't on it.

11 MR. LUSTBERG: Your Honor, the key and I think we're
12 starting to reach an agreement here, is that they can't argue
13 that he should have registered. If they want to point out that
14 he did not register, that's much less prejudicial.

15 THE COURT: I think everyone understands.

16 Yes. Government.

17 MR. RICHENTHAL: Yes. He's not charged with that
18 offense. We're not going to argue he committed that offense.
19 Absolutely.

20 THE COURT: All right.

21 MR. LUSTBERG: That's what we want.

22 THE COURT: Excellent. Thank you.

23 Those are the in limines, and you have my statement on
24 the stipulation for the Rule 15. Let's handle some other
25 things.

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1 I have the agreed statement of the case, which I'll
2 read to the venire. I thank you for it.

3 I want an agreed upon jury verdict form, if the
4 parties are able to agree upon a jury verdict form. I want it
5 presented to me by Friday.

6 I want a list of witnesses from each side. I want it
7 presented to me by Friday as well.

8 I want a list of attorneys, government agents,
9 paralegals who will be sitting at counsel table for each party
10 by Friday as well, because I'm going to read all that to the
11 venire.

12 I want a list of places from each party. When I say
13 each party, the defendants should submit one and the government
14 can submit one.

15 List of places that I need to find out if the venire
16 has had any particular involvement with. It's fairly standard.

17 The way I work, gentlemen and lady, is that on each
18 witness, there's only one attorney, okay? I don't expect to be
19 double teamed, and I don't expect every witness is double
20 teamed. One attorney per party on each witness.

21 I expect evidentiary issues to be brought up before or
22 after the jury leaves. I don't want to waste jury time with
23 sidebars. So to the extent you know evidentiary issues will
24 arise, and men and women of good faith will know in almost all
25 instances that, bring it to my attention so that we're not

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1 wasting jury time. I want an absolute minimum of sidebars. No
2 sidebars are the best, but an absolute minimum.

3 If there's an objection to a question, normally I'll
4 know what it is. Sometimes I'm not sure, I want to hear what
5 the basis is, I'll say "basis." To the extent you can, give me
6 one word, 403, 803(3), whatever it might be, because I don't
7 want to take time to have a sidebar. Presumably the light will
8 go off and I'll understand what the issue is.

9 I need the defendants to divide up cross-examination
10 so that there's no substantive repetition. I shouldn't say
11 substantive. So that there's no material repetition. In other
12 words, Mr. Weitzman will handle one area of cross-examination.
13 Mr. Lustberg another area. Mr. De Castro another area. Get
14 together with that, so that we're not wasting everybody's time.

15 What's the estimate at this point, now that
16 everything's been refined, where things have been refined,
17 government, for the length of trial?

18 MR. MONTELEONI: Yes, your Honor. This is something
19 we wanted to raise with you. Unfortunately, we're thinking the
20 estimated length of trial is likely to be somewhat higher than
21 we were hoping, possibly by one or two weeks, because although
22 there has been progress with stipulations, there have still
23 been no stipulations that have been signed, and a number of
24 these authenticity stipulations could necessitate calling a
25 number of custodians.

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1 I will say --

2 THE COURT: There should be no authenticity issues
3 unless there's a genuine authenticity issue. Parties should be
4 able to resolve authenticity issues by stipulation.

5 MR. MONTELEONI: Yes, your Honor. We --

6 THE COURT: Everybody will agree with that but that
7 may not happen. I want it to happen.

8 MR. MONTELEONI: We do, too, and we've been working
9 with defense counsel. We understand at least one defense
10 counsel has a problem with some of the standard language in the
11 stipulation about the stipulation itself being admissible, and
12 so we're --

13 THE COURT: The stipulation of authenticity is always
14 admissible. It says on it that you're admitting the
15 stipulation and the underlying documents to which the
16 stipulation of authenticity applies.

17 MR. MONTELEONI: I can't speak to why the defense
18 counsel has developed this concern. Obviously, for
19 authenticity, we're proposing stipulations for some documents
20 that the defense is going to argue are not admissible, whether
21 to knock out a need for a witness, if they're admissible on
22 other grounds -- we think they want to change the language of
23 the stipulation some way. They sent over a proposal to address
24 this concern, which we've never really encountered as a concern
25 before, last night and we're going to see if we can accommodate

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1 it.

2 We don't think this should stand in the way, but to be
3 clear, we've proposed -- starting April 24 we've proposed a
4 long series of stipulations. They principally concern
5 authenticity, and the ones that are outstanding are really
6 about this and --

7 THE COURT: About authenticity.

8 MR. MONTELEONI: Yes. There are ones that they object
9 to that are arguably more substantive that we understand,
10 that's fine, we'll just call the witness, but there's a number
11 of outstanding ones that absolutely go to authenticity,
12 including, for example, a 33-page stipulation that recounts the
13 authenticity of materials extracted from 31 different
14 electronic accounts and devices, which we sent to them shortly
15 after providing exhibits. We have heard some encouraging
16 noises on that one, but they've asked for more information last
17 night. We're going to provide it to them, but we don't know if
18 it will satisfy them. We hope it does. If it doesn't, we're
19 going to be offering evidence subject to connection and calling
20 perhaps a large number of FBI custodians at the end of our
21 case.

22 THE COURT: All right. All I can say now is let's
23 avoid that to the extent possible. I'm not going to force an
24 authenticity stipulation. If there are real issues of
25 authenticity, somebody should call a witness, but normally

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1 these are handled by authenticity.

2 There are going to be -- I mean, we're calling upon
3 the good citizens of the State of New York to sit here for what
4 was four to six weeks, and to the extent it's longer, it's
5 going to be even more difficult to get people, and that's a
6 concern. I've called in a panel on the basis of four to six
7 weeks.

8 You have my views. Unless there's a serious issue of
9 authenticity, it should be stipulated to. It's not addressed
10 to you. It's addressed to the lawyers.

11 Mr. Fee.

12 MR. FEE: Your Honor, just to be --

13 THE COURT: I assume you don't disagree with what I
14 have said.

15 MR. FEE: Well, I disagree -- this was an awfully
16 abridged summary. We have no problems with authenticity stipulations.
17 You just heard him refer to a 33-page stip. It's a fact stip,
18 your Honor. It described how they extracted evidence. We have
19 no issue with authenticity stipulations. Every single one of the
20 stipulations proposed to us contain things well beyond
21 authenticity, and a number of errors. There's 42 of them. I
22 think we've gotten back to them --

23 THE COURT: Forty-two what?

24 MR. FEE: Stipulations. We've gotten back to them
25 with nearly half. We're dealing with all this at the same time

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1 as trial preparation. We are working very hard, your Honor. I
2 don't think there's going to be any authenticity dispute at
3 all.

4 THE COURT: All right.

5 MR. MONTELEONI: Your Honor, may I just add one thing?

6 THE COURT: Yes.

7 MR. MONTELEONI: We have been working with them, and
8 I'm not -- I mean, I am hopeful that we will reach these
9 agreements. There have been some positions that they've taken
10 where -- for some documents, where we are calling a witness
11 they don't want to stipulate to the authenticity of the
12 document, because they're going to want us to actually ask the
13 witness about it on the stand even if we otherwise wouldn't
14 have done that. We're trying to work through that. It's
15 potentially going to be, again, something where we'll have to
16 introduce evidence subject to connection and potentially ask
17 witnesses more questions than we would need to before the jury.
18 We're going to try. We certainly are trying in good
19 faith.

20 THE COURT: All right. Do so.

21 MR. FEE: I'm sorry, your Honor. What was the
22 estimate they offered?

23 THE COURT: Four to six.

24 MR. FEE: Four to six. Okay.

25 MR. MONTELEONI: Yes, if the stipulations are worked

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1 out, then that's our view.

2 THE COURT: Okay. Well, I'm going to give an honest
3 estimate to the panel, so you'll let me know.

4 MR. MONTELEONI: I think at this point we should have
5 to say five to seven or potentially more. If we have a lot of
6 signatures in the next few days, then maybe we can revise that
7 back down.

8 THE COURT: That may need a bigger panel. I would
9 hate to run out of venire men and women and have to call in a
10 second panel, which would itself delay things.

11 All right. We'll take it as it comes. Try to work
12 out those stipulations so that I can say in good faith four to
13 six weeks. I'll add, one never knows with trials. It could be
14 shorter. It could be longer. But I do need to give them a good
15 faith basis for an estimate.

16 Sir.

17 MR. FEE: Just for accuracy, your Honor, I assume
18 that's the government's estimate. We would estimate one to two
19 weeks for the defendants' case.

20 THE COURT: All right. I intend to, especially in
21 light of this discussion, impanel six alternates. Now, my
22 reading of Rule 24 is as follows: Twelve seated jurors, six
23 seated alternates, six government peremptory challenges, ten
24 defense challenge. You'll share the challenges amongst the
25 defense. When six alternates are chosen, the government gets

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1 three additional peremptory challenges, and the defense gets
2 three additional peremptory challenges. That's 24(c)(4)(C).
3 That's a total of 40 jurors, as I read it. If anyone
4 interprets Rule 24 differently, let me know.

5 That means, out of the array that I'm calling in, we
6 can't start picking until we have 40 jurors who are not
7 disqualified or excused. Be aware of that at all times.

8 Who's doing the opening for the government, and how
9 long is the estimate? I don't demand that you stick to a time
10 estimate, but I want a good faith basis.

11 MR. LUSTBERG: Judge, just before you get to that, let
12 me make this application, as I've typically done and I think
13 others have in cases of this magnitude, that the Court expand
14 the ten and six from Rule 24 to 12, just giving two more
15 peremptories to the defense so that each of us gets four, since
16 there are three of us, and then the government could get one or
17 two more, too, if they wish to even it up. It would only add a
18 few more jurors but allow us sufficient peremptories among each
19 of the three of us for that protection to be meaningful.

20 THE COURT: I see no need for that. You've been
21 working cooperatively up to now.

22 MR. LUSTBERG: Judge, along those lines, working
23 cooperatively, this is a conspiracy case, and we would ask the
24 Court, as things proceed, to be able to consult among ourselves
25 with respect to jury strikes not in front of the jury panel.

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1 THE COURT: Yes.

2 MR. LUSTBERG: Okay. Thank you.

3 THE COURT: Is the application for you to talk amongst
4 yourselves?

5 MR. LUSTBERG: Talk amongst ourselves without the jury
6 watching that interaction.

7 THE COURT: Oh, no. I understand that. Yes, of
8 course.

9 Who's doing the opening for the government and how
10 long is the estimate?

11 MR. MONTELEONI: Lara Pomerantz will be giving the
12 government's opening, and the opening will be no more than 45
13 minutes.

14 THE COURT: Defense, who's doing it, and in what order
15 and how long?

16 MR. WEITZMAN: Your Honor, I will be delivering the
17 defendant's opening on behalf of Senator Menendez. I expect to
18 be about an hour.

19 THE COURT: You're first up? The defense have decided
20 that?

21 MR. WEITZMAN: We haven't discussed it.

22 THE COURT: All right. You'll let me know.

23 MR. WEITZMAN: Yes.

24 THE COURT: Right now Mr. Weitzman is first up.

25 MR. LUSTBERG: Your Honor, I will be doing the defense

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1 opening for Mr. Hana, and we expect it to be a half hour.

2 MR. DE CASTRO: Hi. For Mr. Daibes, Mr. De Castro
3 will do it, and I'm thinking 20 minutes, 20 to 30.

4 THE COURT: Here's how I intend to pick this jury. I
5 can fit 102 members of the venire here. It's considerably more
6 than I normally do, but it will help cut down repetitive
7 questioning. That's 18 in this group. That's six rows of
8 eight each on the right, and six rows of six each on the right.
9 That means that people who are not involved in trial will be in
10 the back row. All the others will be at the beginning at least
11 occupied by members of the venire.

12 One of the -- I'll explain, I'll read the agreed upon
13 statement and explain some basic things, and at some point very
14 close in I will ask that those who cannot sit for whatever time
15 I feel is appropriate, either four to six weeks, or five to
16 seven weeks, for a substantial reason, to raise their hands.
17 At that point, I'll ask those who have not raised their hands,
18 in other words, who can sit for the appointed time, to go to
19 another courtroom that we have. That's so they don't have to
20 sit here while I question each and every juror who feels he or
21 she cannot sit.

22 So they'll go to another courtroom and we'll have a
23 CSO or -- probably CSO there. Then I will go one by one and
24 find out what the reasons are that they can't sit. That will
25 take a considerable period of time. I then will excuse those

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1 who I feel cannot sit. I'll ask the parties if they have any
2 additional people that they want me to excuse.

3 To make it simple, when everyone comes in, my deputy
4 will read their names out, and they'll sit in order. And we
5 have index cards with a number, so from then on I'll refer to
6 them by the number. It just makes it a lot easier. And
7 they'll hold up the number, so they don't have to be concerned
8 about remembering.

9 My clerks will try to make sure that the people sit in
10 the number in which they're called, because sometimes if
11 somebody's close in, they may sit before the person with the
12 lower number. But we'll get it straight or we'll certainly try
13 to. I'll refer to everybody by their numbers.

14 After those who cannot sit for the period of time of
15 the trial are excused, we'll bring the other people back, and
16 I'll do the general questioning. Then at some point I will do
17 the individual questioning.

18 At the end, I'll ask if the parties -- we'll go to
19 sidebar. I'll ask if the parties have any additional questions
20 that they feel I should be asking or any follow-up and we'll
21 handle it that way. I'll give the parties time to order their
22 pre-empts outside the hearing of the jury, and then we'll go to
23 sidebar and we'll pick the jury.

24 Normally I can do that around lunchtime, either before
25 or after lunch. I think this is going to probably take a day,

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1 if not more. I mean, that's my estimate. We'll see. You
2 should be prepared for your openings on Monday, but I don't
3 know if we can get to it. That's mechanically how I intend to
4 do it.

5 Are the parties working on the stipulations that were
6 discussed in regard to the classified information?

7 MR. RICHENTHAL: They've been signed, your Honor.

8 THE COURT: Each. Each of the two.

9 MR. RICHENTHAL: Mr. Mark can provide more detail.
10 One has been signed. One we anticipate being signed soon. If
11 the Court would like more information --

12 THE COURT: No. That's accurate. Get those to me.

13 MR. RICHENTHAL: We don't anticipate that being an
14 issue, your Honor. The parties work together well.

15 THE COURT: Okay. That's everything I have.

16 Is there anything anyone else has?

17 MR. MONTELEONI: Yes, your Honor. We've been engaging
18 with defense on several issues. We've not really been able to
19 reach agreement on some matters, such as when parties are going
20 to exchange opening slides. We think it would be helpful if
21 anyone who is using a visual in their openings would exchange
22 them a day in advance or --

23 THE COURT: I'm sorry. I thought I had addressed that
24 the last time. If you're using demonstratives, yes, I want the
25 other side to have them in advance, not that morning.

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1 MR. MONTELEONI: Thank you, your Honor.

2 THE COURT: I want everybody to go to Mother's Day
3 celebrations as well to the extent possible.

4 MR. MONTELEONI: Thank you.

5 One or two other things. We've, on several occasions,
6 raised with the defense providing copies of the materials that
7 they've obtained through their subpoenas. We've done this for
8 months. We've recently understood that some witnesses have
9 actually gotten subpoenas and produced materials that we have
10 not gotten from the defense. We don't understand why that's
11 the case. And in one case, it was a production from a
12 subpoena, and in another case, it was a subpoena to the Senate.
13 The subpoena was withdrawn and the documents were provided
14 voluntarily, but we think that that also counts as related to
15 the subpoena and we would request that they be provided.

16 And in the context of Senate documents in particular,
17 those can be very relevant to an issue that we raised in
18 connection with the notice issue, which is the possibility of
19 waiver of speech or debate protections, which we want to be
20 very clear we think it's very possible that defense counsel
21 will introduce evidence of the Senator's legislative acts, and
22 if he does so, we anticipate --

23 THE COURT: He votes -- for example, votes, and
24 speeches on the floor, is that what you're talking about?

25 MR. MONTELEONI: Well, yes, but also the Court ruled

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1 that holds and the lifting of holds with respect to FMS and
2 FMF, the military aid we described in the indictment, were also
3 legislative acts. We think it's very possible that the Senator
4 will be intending to introduce evidence of that, and we want to
5 be very clear that if that happens, we intend to seek
6 permission to ourselves offer evidence of the subjects of his
7 conduct with respect to holds, with respect to lifting of holds
8 and the like, because that is a waiver for all the reasons that
9 we put forth in our notice letter.

10 But, regardless, even beyond that, which hasn't
11 arrived yet, we still don't have these subpoena returns that
12 the defense has been collecting and has not provided to us.

13 THE COURT: The agreement of the parties is to provide
14 the subpoena returns?

15 MR. MONTELEONI: We haven't really gotten an agreement
16 from the defense, but we've been -- oh, sorry, there's also
17 been a -- I should say that there's also been an order that the
18 Court issued for defense exhibits, and only one defendant has
19 identified their exhibits by the April 26 deadline. The other
20 two, they haven't identified anything by the deadline, and they
21 haven't identified anything after either.

22 I understand if -- you know, they're saying, well,
23 they're -- you know, they're dealing with a volume of material
24 that we provided, but really the deadline was April 26 and we
25 haven't gotten anything. So we would ask that the defense, in

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1 fact, designate to us their exhibits, so that we can prepare
2 for trial and produce the materials that they've obtained in
3 response to their subpoenas.

4 THE COURT: Mr. Fee.

5 MR. FEE: I have a solution, your Honor. If we were
6 told the witnesses they expect to call in the next two weeks,
7 it sure would help us focus on what amongst the 50 witnesses on
8 the witness list and the 10,000 exhibits that might be coming
9 in through those witnesses, and then we can figure out what
10 non-impeachment exhibits we might have. Frankly, I don't think
11 there's very many, but that would be really helpful, your
12 Honor.

13 MR. MONTELEONI: Your Honor, the April 26 deadline was
14 set for the defense's case, not for the first two weeks of the
15 defense's cases.

16 THE COURT: Yes.

17 MR. MONTELEONI: And Rule 17 requires them to be
18 providing these materials, and we don't understand why we even
19 have to raise this, why they're not just complying with that.

20 MR. FEE: That order didn't apply to the defense's
21 case, your Honor. Your Honor, as a practical matter, we can
22 only identify the things we have identified. We're working
23 through a ton of stuff. We have disclosed what are the
24 exhibits we intend to submit now.

25 Your Honor, this is not an argument. There's a

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1 50-witness list. We don't even know, most of those witnesses,
2 what they will testify about, because they're just FBI
3 witnesses. So we are doing the best we can. I would ask -- I
4 think this is something we need to address, of greater
5 importance, the government needs to identify the witnesses it
6 intends to call at some point before the trial starts, because
7 it will be a mess if -- we would like to get them on the Friday
8 before. Here are the witnesses we expect to call this week.
9 Obviously they can make adjustments. Here are the witnesses we
10 expect we'll call on Monday and Tuesday. We'll update you on
11 the sequence the rest of the week, and so on throughout this
12 trial.

13 THE COURT: This all ought to be done by agreement.

14 MR. FEE: I agree, your Honor.

15 THE COURT: Government, they're entitled to some
16 advance notice of who the witnesses are going to be.

17 MR. MONTELEONI: Absolutely, and we've been
18 negotiating. We've sent forth a proposal. We sent them a
19 proposal earlier -- I'm sorry, last week now. A few days ago
20 on May 1st was the most recent version. We haven't heard back
21 from them. We think that the Friday before, a whole week, is
22 -- that's really not very realistic with the logistics of how
23 the trial works and what we're arranging.

24 We certainly are intending to tell them as we get
25 close to the witnesses who is coming up. We want to tee up any

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1 evidentiary issues, also. So we have a proposal. They've I
2 think just, you know -- they have a different view.

3 THE COURT: What's the proposal?

4 MR. MONTELEONI: Well, our proposal is we will let
5 them know at the end of the trial day the witnesses -- yes.

6 MR. FEE: The night before, your Honor.

7 MR. MONTELEONI: The next witnesses anticipated in
8 order, and the exhibits that we expect to be introduced by 7:00
9 PM.

10 THE COURT: So what -- the witnesses for what, the
11 next day?

12 MR. MONTELEONI: For the next day.

13 MR. FEE: It will be a train wreck, your Honor.

14 MR. MONTELEONI: Your Honor, I also would say we also
15 do intend to work in good faith to provide them with
16 information earlier, but we don't like the idea of a
17 requirement that we are going to held to have violated if --
18 because things change all the time, especially some witnesses
19 are coming from out of the country and we have multiple
20 different crosses, the length of which is going to be very
21 difficult to anticipate.

22 So, you know, we are open to doing somewhat more in
23 advance of this -- we've also I can say, as the Court knows,
24 shared draft summary charts now almost two weeks in advance of
25 trial, which covers a very large portion of our exhibits. So

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1 we're not trying to hide the ball here. We're just trying to
2 avoid a commitment that's not going to be very realistic for
3 how trial progression is going to progress.

4 THE COURT: Normally, again, these are things that the
5 parties handle themselves. I understand that there are issues,
6 and you should let them know if there are issues, if this
7 person is coming from abroad and so forth. Give them two days
8 at a minimum of witnesses, all right, with the relevant
9 proviso, to the extent you can do more that will engender good
10 will on the part of the other side, okay, but let's not be too
11 -- give them a couple of days.

12 MR. FEE: Your Honor, I would ask to make that a
13 longer period. They are going to hold us to that two days.
14 They are telling witnesses now when they're going to show up.
15 We can see it in the 3500. We've all tried long cases in this
16 district. Two days in a case of this length will make your job
17 and the jury's experience much, much worse.

18 We are not going to say, oh, Mr. Monteleoni, you
19 didn't tell us about this witness, preclude. We understand
20 things happen. We're all trial lawyers. Two days is not
21 enough.

22 THE COURT: Right now two days. We'll see if it's not
23 enough. I need the parties to start working together.

24 MR. MONTELEONI: Thank you, your Honor. But we still
25 have not received their subpoena responses and our --

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1 MR. FEE: They don't get our subpoena --

2 THE COURT: Let him finish.

3 MR. FEE: Sorry, your Honor.

4 MR. MONTELEONI: These are materials that are called
5 for by Rule 17. We haven't gotten them. We request they be
6 directed to provide them to us.

7 MR. FEE: Your Honor, we'll comply with the Rule 17
8 obligation. They don't get everything we get in response to a
9 subpoena. We're working on it, your Honor. There's a lot
10 going on.

11 THE COURT: Well, there's a lot going on for
12 everybody. Do it.

13 MR. FEE: Thank you, your Honor.

14 THE COURT: Anything else?

15 MR. MONTELEONI: This doesn't require immediate
16 action, but as regards how the trial examination is going to
17 proceed, we should note that a number of our witnesses, as
18 you'll see on Friday when we submit the lists, are identified
19 with an adverse party, either because they have employment
20 relationships with the defendants or they are I guess in this
21 case former counsel for the defendants, so there may be
22 examination by leading questions under Rule 611 as a result of
23 that.

24 THE COURT: You're telling me --

25 MR. MONTELEONI: Letting you know it's going to be a

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1 little unusual.

2 THE COURT: You're telling me that you will be calling
3 adverse witnesses.

4 MR. MONTELEONI: Yes. A number of our witnesses will
5 be adverse.

6 THE COURT: I understand what the rules are.

7 MR. FEE: Two quick points, your Honor. The list of
8 witnesses I believe was the word you used, obviously, for the
9 defense, we're not required to list those witnesses. We don't
10 know who the witnesses are going to be.

11 THE COURT: Exhibits --

12 MR. FEE: Lists of name and places for the disclosure
13 in trial, a list of names and places that are likely to come up
14 at trial.

15 THE COURT: That's what I started with, yes.

16 MR. FEE: Got it. Second, your Honor, I don't think
17 this is an issue -- we are submitting a short reply on the Rule
18 15 briefing today, and I'd ask you to hold off on ruling until
19 you have a chance to read that reply.

20 THE COURT: Well, you heard I want the parties to be
21 able to stipulate --

22 MR. FEE: I agree, your Honor. We're working on that.

23 THE COURT: I'm not going to decide it today.

24 MR. FEE: Thank you, your Honor.

25 THE COURT: All right.

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1 MR. MONTELEONI: One thing, I'm not sure I totally
2 understood what Mr. Fee said. We do need the names for voir
3 dire of people they might call, whether or not they are going
4 to call them.

5 THE COURT: Yes. Absolutely. I don't want somebody
6 showing up as a witness who wasn't on that list of possible
7 witnesses absent something extraordinary.

8 MR. FEE: That's right, your Honor.

9 THE COURT: Thank you all. I appreciate it.

10 MR. FEE: Thank you, your Honor.

11 (Adjourned)
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